Supreme Court, U.S.
FILED
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91-1463
NO.

In the
Supreme Court of the United States
OCTOBER TERM, 1991

THE FEDERAL SAVINGS AND
LOAN INSURANCE CORPORATION,
RECEIVER FOR NEW ORLEANS FEDERAL
SAVINGS AND LOAN ASSOCIATION
Plaintiff/Appellee

VS.

LEONORA SWORDS, wife of/and JAMES L.
ANDERSON, SR., ELSIE ROBERTSON, wife of/and
GEORGE L. PERTUIT, III, PATRICIA VALE, wife
of/and GEORGE M. BODRON, CHARLES F. BRAVE
and ABERDEEN PREFERRED,
A PARTNERSHIP IN COMMENDAM
Defendants/Applicants

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. That it was error to hold that the records of the homestead did not disclose written evidence of the approved assumption of liability by the sale from Pertuit, et al to Aberdeen Preferred, a partnership in commendam, on January 16, 1975, *when the records of the homestead for the relevant period (December 1974 and January 1975) were either lost, misplaced, or missing.*

2. That it was error to hold the third party defendants, Kavanaugh, Talley and Rouse were not liable to the third party plaintiffs on the third party demand asserted herein.

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PARTIES TO PROCEEDING

1. Lenora Swords, wife of/and James L. Anderson, Sr.

2. Elsie Robertson, wife of/and George L. Pertuit, III.

3. Patricia Vale, wife of/and George M. Bodron.

4. Nathan Greenberg, Attorney.

5. The Federal Deposit Insurance Corporation.

6. Roy S. Lilley, Attorney.

7. Kavanaugh & Talley.

8. Joseph H. Kavanaugh.

9. Ray W. Talley.

10. Gary J. Rouse.

11. Margaret Woodward, Attorney.

12. Aberdeen Preferred, a Partnership in Commendam.

13. Eric Holden, Attorney.

14. Charles F. Brave.

15. Ann S. Duross.

16. Colleen B. Bombardier.

17. John P. Parker.

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LEONORA SWORDS, wife of/and JAMES L. ANDERSON, SR., ELSIE ROBERTSON, wife of/and GEORGE L. PERTUIT, III, PATRICIA VALE, wife of/and GEORGE M. BODRON, CHARLES F. BRAVE and ABERDEEN PREFERRED,
A PARTNERSHIP IN COMMENDAM

Defendants/Applicants

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The instant application for a writ of certiorari or review is filed herein by Leonora Swords, wife of/and James L. Anderson, Sr., Elsie Robertson, wife of/and George L. Pertuit, III, and Patricia Vale, wife of/and George M. Bodron, following the decision of the Honorable U. S. Court of Appeals, Fifth Circuit, rendered on December 12, 1991, affirming the prior judgment of the Honorable U. S. District Court for the Eastern District of Louisiana, Section "D".

Application for re-hearing was filed and was denied on January 30, 1992.

LOWER COURT OPINIONS

The decision of the U. S. District Court for the Eastern District of Louisiana is not a reported decision. Similarly, the decree of the Hon. United States Court of Appeals, Fifth Circuit is not a reported decision.

JURISDICTION

Jurisdiction of this Honorable Court is invoked under Title 28 U.S. Code, Section 1254 and Section 1651, seeking a review of the judgment of the Honorable United States Court of Appeals, Fifth Circuit, handed down on December 12, 1991. An application for re-hearing was filed and was denied on January 30, 1992.

This application for a writ of review is timely under the provisions of 28 U.S. Code, Section 2101(c).

PRINCIPLES AND STATUTES INVOLVED

Citation of 12 U.S. Code, Section 1823(e) and *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 448 (1942).

Originally appellants contended that they had been released by an agreement with the president of New Orleans Federal at the time they were requested to sign an act of sale and assumption. A letter was given to them

stating that a written release would be prepared by Mr. Gary Rouse, the attorney for New Orleans Federal who was then in the process of passing the sale and assumption. Messrs. Pertuit et al then proceeded to sign the sale and assumption, they were given the letter, and thereafter the homestead obtained a purchaser. No written release was forthcoming, and after this litigation commenced, appellants learned that no written release was contained in the then existing records of the homestead. Subsequent investigation disclosed that the homestead records for December, 1974 and January, 1975 were either lost, misplaced or missing. Therefore, the *D'Oench* rule and 12 U.S.C. §1823(e) cast an impossible burden upon the appellants, and that is why this application for a writ of certiorari is being filed.

Thus, whenever we say herein that there was no record of the release contained within the records of the loan committee or the Board of Directors of New Orleans Federal (NOF), we are stating that with due consideration for the fact that the minutes of both of the Board of Directors and the loan committee for the critical period (December, 1974 and January, 1975) are lost, misplaced or missing. (See affidavit of Roy Lilley at A-26)

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Leonora Swords, wife of/and James L. Anderson, Sr., Elsie Robertson, wife of/and George L. Pertuit, III, Patricia Vale, wife of/and George M. Bodron, applicants for a writ of certiorari with respect represents:

STATEMENT OF THE CASE

On December 20, 1972, petitioners, James L. Anderson, George M. Bodron, George L. Pertuit, III, and Charles F. Brave, were parties to three acts of sale affecting property known as Lots 8A, 9A, and 10A, Square F, Scotsdale Subdivision, Jefferson Parish, Louisiana. Thereafter, the parties to the sale were notified of their loan with New Orleans Federal Homestead (NOF) being in default and they appeared at the homestead's attorney's office on December 18, 1974, for the purpose of complying with the directions of the homestead. When the meeting occurred on that date, the defendants refused to execute the sale and assumption which had been previously prepared for their signature because they were not being given a full release from the homestead. After some haggling back and forth the then president of NOF instructed their attorney to prepare a release and Messrs. Pertuit, et al, proceeded to sign the sale and assumption. Thereafter, the homestead obtained the purchaser, Aberdeen Preferred which in turn assumed the mortgage in favor of the homestead by written document dated January 15, 1975. No written release was forthcoming and Aberdeen Preferred proceeded to continue to make payments on the homestead loan until about 1988 when demand was subsequently made by NOF upon the original makers of the note and mortgage. Thereafter, this case resulted and it has been continuously litigated ever since.

Neither NOF nor its attorney prepared the release which the president of NOF directed on December 18, 1974. When Aberdeen Preferred went into default, thereafter demand was made upon Messrs. Pertuit, et al, and the matter has been vigorously litigated ever since.

SPECIFICATIONS OF ERROR

1. That it was error to hold that the *D'Oench* doctrine applied herein as to the Swords Group, namely, Leonora Swords, wife of/and James L. Anderson, Sr., Elsie Robertson, wife of/and George L. Pertuit, III, and Patricia Vale, wife of/and George M. Bodron.

2. That it was error to fail to hold that the Article XVII defense should not apply to bar the claim of FSLIC as to Leonora Swords, wife of/and James L. Anderson, Sr., Elsie Robertson, wife of/and George L. Pertuit, III, and Patricia Vale, wife of/and Charles M. Bodron.

3. That it was error to hold that the Swords Group was not released from liability herein by the plaintiff because of the release of 1974 or the Article XVII defense.

4. That it was error to hold that the records of the homestead did not disclose written evidence of the approved assumption of liability by the sale from Leonora Swords, wife of/and James L. Anderson, Sr., Elsie Robertson, wife of/and George L. Pertuit, III, and Patricia Vale, wife of/and Charles M. Bodron, to Aberdeen Preferred, a partnership in commendam on January 16, 1975, *when the records of the homestead for the relevant period (December 1974 and January 1975) were either lost, misplaced or missing.*

5. That it was error to hold that the third party defendants, Kavanaugh, Talley and Rouse, were not liable to third party plaintiffs on the third party demand asserted herein.

ARGUMENT

We have carefully considered our position in connection with this matter, and we must respectfully point out that both the district court and the Fifth Circuit have held that the failure to produce the records of the NOF becomes the responsibility of the borrowers. Such an unfair result is truly ludicrous for the following reasons:

(a) The records of NOF should have been constantly in its possession from the date of the act of sale in 1974; and

(b) The records of NOF since its request to the Swords group (Pertuit, et al) to transfer the property back to NOF has been constantly in the possession of the homestead; and

(c) NOF did not have any release in its minutes of its board of directors or of the loan committee; however, the minutes for the critical period (December 1974 and January of 1975) were missing from the records of NOF; and

(d) Whose responsibility was it to maintain the records of NOF for December of 1974 and January of 1975? Certainly not the Swords group (a/k/a Pertuit, et al); and

(e) How unfair can both the district court and the Fifth Circuit be when they cast the burden of

> production on the Swords group (a/k/a Pertuit, et al) as the borrowers. What control did any of them have over the records of NOF? Since the obligation of maintaining the records was upon the S & L (NOF) how could the borrowers be responsible for the failure of FSLIC or NOF to have anything in its records about the release which was to have been granted to the Swords group (a/k/a Pertuit, et al).

Diligent research has disclosed no comparable decision which has held that the minutes of the board of directors or the loan committee during a critical period were missing from the official records of the S & L. The closest decision that we can find is *Federal Deposit Insurance Corp. v. deJesus Velez*, 678 F.2d 371 (1st. Cir. 1982) wherein there was a private agreement between the homestead and its borrower; however, the letter agreements were kept in the personal safe of the bank president. Neither was made a part of the bank's official records. For this reason, the court held that the agreements which were clearly side agreements and clearly collateral agreements and operated to the detriment of the homestead could not be permitted. However, here we have a clearly unfair and inequitable situation arising from the fact that the homestead's records for the critical period (the time of the sale and assumption by the Swords group (Pertuit, et al) to Aberdeen Preferred is clearly missing from the records of that institution. Diligent search disclosed no records for the period from December of 1974 and January of 1975. How could the Swords group (Pertuit, et al) be held to be responsible for those missing records?

Here we have no collateral agreements; we have no hanky-panky as between the homestead and the borrower; we have here no improper action on the part of the bor-

rower; therefore, how can the borrower be held liable for the loss or misplacement of the homestead records for the critical period?

The Fifth Circuit decree of December 12, 1991 provides that "the release letter prepared by NOF's attorney was not in NOF's records; nor were any other documents found in NOF's records indicating that the Swords group had been released from liability under the notes and mortgages."

We respectfully point out that NOF's minutes of its board of directors and its loan committee for the year of 1975 are missing; that ample opportunity was given to defendants to search the existing records of NOF in the possession of FSLIC, and admittedly no records of either the board of directors or the loan committee of NOF were found for the critical period. *It is quite clear that the minutes of the loan committee and the board of directors are missing for the period from December 18, 1974 through the entire month of January of 1975.* Thus, with the records for the critical period being completely missing from the board meetings and the loan committee meetings, how can the defendants (the Swords group, a/k/a Pertuit, et al) be held liable for the non-existence of the records of NOF if the homestead records are unavailable? We are cognizant of the fact that FSLIC needs only to look to the express terms of the insolvent institution's official documents. As a matter of fact, the statute, 12 U.S.C. §1823 provides:

"(e) Agreements against interests of Corporation

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821

> of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement —
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) *was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee,* (emphasis supplied) and
>
> (4) has been continuously, from the time of its execution, an official record of the depository institution."

How can the Swords group, a/k/a Pertuit, et al, be liable for the records of NOF which are now non-existent? *How can the Swords group, a/k/a Pertuit, et al, be liable in judgment herein for the records of NOF which are now misplaced or lost.*

The minutes of the crucial period of either the loan committee or the board of directors cannot be ascertained from the records of NOF since those minutes for December of 1974 and January of 1975 are missing from NOF's records. The affidavit of Roy Lilley, as attorney for FSLIC, clearly discloses the extent of the search conducted by FSLIC to ascertain the records of the critical period. *How could the Swords group (Pertuit, et al) control reference in those records to the acceptance of the transaction and the*

agreement thereto by NOF when its records for that critical period of time are unavailable, non-existent, missing, misplaced or lost?

The *D'Oench* statute clearly provides for approval of the board of directors of the depository institution or its loan committee to be reflected in the minutes of the said board or committee; and when the minutes for the critical period are missing, misplaced or lost, how can the Swords group (Pertuit, et al) be responsible at this late date?

It is to be noted that neither the decree of the Fifth Circuit Court of Appeals nor the reasons for judgment of the trial court refer to the lost or misplaced records of NOF. Evidence in the district court from a former member of the board of directors clearly indicated the chaotic condition which occurred when FSLIC took over NOF late on a Friday afternoon. We further have the positive testimony of Mr. Talley as to the degree of particularity with which the homestead maintained in connection with its minutes of both its board of directors and its loan committee; therefore, how can there be a presumption against the Swords group (a/k/a Petuit, et al)?

We respectfully submit that NOF and/or FSLIC had a duty to preserve its minutes; that minutes of the board of directors and of the loan committee were misplaced, lost or missing after FSLIC took over; that the fact that the minutes during that critical time period were unavailable should not militate against the Swords group (Pertuit, et al). They were not guilty of any fraud or wrongdoing, and the purchaser from them, Aberdeen Preferred, performed in connection with the sale and assumption for approximately fourteen (14) years before the loan went into default.

We do not believe that the Swords group (Pertuit, et al) should be held to be liable herein because FSLIC cannot produce the minutes of the critical period. The *D'Oench* doctrine allows FDIC to rely on official bank records, as set forth in the Fifth Circuit decree; however, where the bank records have been lost or misplaced, how can the Swords group (Pertuit, et al) be held to be at fault when the homestead (NOF) or FSLIC cannot produce the records of the critical period, i.e., December 1974 and January 1975.

From a standpoint of chronology, it is quite clear that Mr. Rouse, the attorney for the homestead, was obliged to furnish a separate written release in accordance with the letter of December 18, 1974. Admittedly that letter is not contained within the records of the homestead or FSLIC which were not found; and since those records for December of 1974 and January of 1975 have been lost or misplaced by FSLIC (as more fully appears from the affidavits of Roy Lilley and Herschell Haag, annexed hereto and identified as Exhibit "A" and Exhibit "B"), how can the Swords group (Pertuit, et al) be held to be liable herein?

The doctrine of equitable estoppel provides a strong basis for protecting the borrowers in this case. Thus, since the borrowers did not generate conduct which created an estoppel, since there was no secret agreement between the borrowers and the bank and the borrowers were wholly innocent of any wrongful action, the borrowers have clean hands and thus should be allowed to assert defenses against the insurer. See *FDIC v. Meo*, 505 F.2d 790 (9th Cir. 1974). The borrowers' conduct would not open the floodgates to numerous suits against the FDIC or FSLIC since it is extremely rare that such a defense would be propounded by a truly innocent borrower. Furthermore, how often can the borrower show that the minutes of the board of directors or the loan committee for the critical period are

lost or misplaced?

We are only seeking to obtain a fair result; and the result sanctioned by both the district court and the Fifth Circuit clearly makes no recognition of the missing minutes of either the board of directors or the loan committee. We further submit that the original district judge who tried this case must have recognized the basic unfairness of strict applicability of the *D'Oench* doctrine when the borrowers did nothing to place themselves in jeopardy and were wholly innocent of any wrongful action. See 62 So. Cal. Law Rev. 253, at 285, et seq. He held the case open after the conclusion of the trial for production of any other evidence which may have tended to support the position of the original borrowers.

REASONS FOR GRANTING THE WRIT

We know of no case holding a borrower/mortgagor liable where a release from indebtedness was claimed and the records of the release were not found within the corporate records of the board of directors of the homestead or of its loan committee *because those records for the crucial period are missing, lost or misplaced.* The burden here has been cast upon the borrower/mortgagor to produce a copy of a release from within the homestead records, in accordance with 12 USCA, §1823(e); however, where it is impossible to produce those corporate records, it would be totally and completely unfair to cast that burden upon the mortgagor/borrower. Where diligent search has been made for the records, from both the homestead and FSLIC, and the records for the crucial period (December of 1974 and January of 1975) are not available because they are either lost, misplaced or missing.

If it were not for 12 USCA, §1823(e), we would then

begin to look to other evidence to ascertain what had been done, i.e:

(a) Copies of written documents evidencing the release; or

(b) Copies of written documents evidencing the intent to release; or

(c) Copies of the release itself.

However, Section 1823(e) requires that a record of the release be within the corporate records of the board of directors or the loan committee. That cannot be done because the records for the crucial period of time are missing!!!

We would respectfully submit that the loss of the records for the crucial period falls upon the shoulders of FSLIC. We produced testimony to show the chaos which prevailed on the day FSLIC took over; we produced evidence to show the specific detail with which the homestead kept its records, particularly minutes of the board of directors and the loan committee; and we produced evidence to show that the homestead (NOF) prided itself on the meticulous manner with which the minutes were kept. *How can the mortgagors/borrowers be held liable for the debt for which they were supposed to be released, and the records required by 12 USCA, §1823(e) have been lost or misplaced by FSLIC?* It just isn't fair!

Neither the district court opinion nor the opinion of the Fifth Circuit Court of Appeals are reported; thus, copies are annexed hereto in the appendix.

CONCLUSION

In conclusion, we respectfully submit that the judgment of the U. S. Fifth Circuit Court of Appeals and of the Eastern District of Louisiana should be reversed, and that judgment should be rendered in favor of the defendants, the Swords group (a/k/a Pertuit, et al) dismissing the suit of the plaintiff against them, or in the alternative, remanding the said case for a new trial, ordering the plaintiff to produce the minutes of the homestead association (NOF) within thirty (30) days, or suffer the dismissal of plaintiff's action against the said defendants, Leonora Swords, wife of/and James L. Anderson, Sr., Elsie Robertson, wife of/and George L. Pertuit, III, and Patricia Vale, wife of/and George M. Bodron.

Respectfully submitted,

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(504) 366-6491

BY: /s/ Nathan Greenberg
NATHAN GREENBERG
Bar No. 6325
ATTORNEY FOR APPLICANTS

CERTIFICATE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has been mailed to Ann S. Duross, Colleen B. Bombardier and John P. Parker, 550 17th Street, N.W., Washington, D.C. 20429 and to Roy S. Lilley, Lilley and Lightfoot, Suite 1208 Executive Tower, 3500 N. Causeway Blvd., Metairie, Louisiana, Attorneys for Federal Deposit Insurance Corporation, to Margaret Woodward, Suite 318, 610 Poydras Street, New Orleans, Louisiana 70130, Attorney for Kavanaugh & Talley, Joseph R. Kavanaugh, Ray W. Talley and Gary J. Rouse, and to Eric A. Holden, Suite 400, 101 W. Robert E. Lee Blvd., New Orleans, Louisiana 70124, Attorney for Aberdeen Preferred, by depositing same in the U. S. Mail, postage prepaid.

/s/ Nathan Greenberg

NATHAN GREENBERG

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
FEB 4 '91

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, RECEIVER FOR NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION	*	CIVIL ACTION NO. 88-5299 C/W 88-5300 & 88-5303
VERSUS	*	SECTION "D" (1)
LEONORA SWORDS, wife of/and JAMES L. ANDERSON, SR., ELSIE ROBERTSON, wife of/and GEORGE L. PERTUIT, III, PATRICIA VALE, wife of/and GEORGE M. BODRON, CHARLES F. BRAVE AND ABERDEEN-PREFERRED, A PARTNERSHIP IN COMMENDAM	*	

OPINION

These actions arise out of defaults on three notes secured by mortgages on three separate pieces of property.

DATE OF ENTRY FEB 4 1991

The original holder of these notes, New Orleans Federal Savings and Loan Association ("New Orleans Federal"), has been placed in receivership. In December of 1988, the Federal Savings and Loan Insurance Corporation ("FSLIC"), as receiver for New Orleans Federal, brought these three actions to recover the monies owed on the loans and to foreclose on the mortgages securing them. Named as defendants were the current borrower, Aberdeen-Preferred ("Aberdeen"), and the Swords Group[1], from whom Aberdeen had purchased the property and whose obligations on the notes and mortgages Aberdeen had assumed. As a defense to the FSLIC claim, the Swords Group contend that they had previously received a release from their obligations under the mortgages and notes from New Orleans Federal.

I. BACKGROUND

On December 20, 1972, the Swords Group purchased three separate pieces of property in the Scotsdale Subdivision of Jefferson Parish, Louisiana ("the subject properties"). Financing for the purchase of the subject properties was provided to the Swords Group by New Orleans Federal, as reflected in three separate promissory notes, each in the amount of $94,400.00, secured by mortgages on the subject properties. The notes and mortgages executed by the Swords Group were in default in December of 1974, and the property was transferred by the Swords Group to Aberdeen.

By three separate acts dated January 16, 1975 and titled "Cash Sale with Assumption of Mortgage," the Swords Group sold the subject properties to Aberdeen,

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[1] The Swords Group consists of Leonora Swords, wife of/and James L. Anderson, Sr., Elsie Robertson, wife of/and George L. Pertuit, III, Patricia Vale, wife of/and George M. Bodron, and Charles F. Brave.

each for the amount of the outstanding balance on the mortgages executed by the Swords Group on December 20, 1972. In payment of the purchase price, Aberdeen assumed each of the three mortgages on the subject properties, and began making payments on the mortgage to the homestead.

In a letter dated December 18, 1974, the attorney for New Orleans Federal, Gary Rouse, stated that New Orleans Federal would give the Swords Group a full release from their debt; however, no formal written release was ever furnished by New Orleans Federal. Furthermore, neither Mr. Rouse's letter to the Swords Group, nor any other documents which indicate a desire to release the Swords Group from liability are contained in the records of New Orleans Federal. However, the Swords Group alleges that even absent a formal written release, the circumstances of the sale and the subsequent actions of the parties indicate that New Orleans Federal intended to release the Swords Group from their obligations under the mortgage.

II. DISCUSSION

A. The Swords Group was not released from their liability under the acts of sale and mortgage which they signed on December 20, 1972.

The central issue in this case is whether the Swords Group was released from its obligations under the three acts of sale and mortgage which they executed on December 20, 1972, pursuant to the purchase of three lots of land in Jefferson Parish. The Swords Group alleges that considering Mr. Rouse's letter of December 18, 1978, the

written provisions of Article 17[2] of the original sale and mortgage document, and the testimony given at trial, the court should find that they are released from further liability under the mortgages. FSLIC contends that no formal written release was ever issued to the Swords Group by New Orleans Federal, and FSLIC is not bound by any oral or implied agreement to release given by New Orleans Federal; therefore, the Swords Group is still responsible for its obligations under the mortgages.

The court looks to the rule established by the Supreme Court in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 448 (1942), the principles of which have been codified in 12 U.S.C. §1823(e), to determine whether the Swords Group was released from its obligations under the mortgages. In *D'Oench, Duhme,* the Court held that an obligor who "lent himself to a scheme or arrangement" that was likely to mislead bank examiners may not assert against the FDIC any part of an agreement that might diminish the value of his written loan obligation. *Beighley v. FDIC,* 868 F.2d 776 (5th Cir. 1989), *citing D'Oench, Duhme,* 315 U.S. at 360. Moreover, the Fifth

---

[2] Article 17 provides, in pertinent part:

17. Transfer of the Property; Assumption, If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, ... Lender may, at Lender's option, declare all the sums secured by this mortgage to be immediately due and payable. Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Mortgage shall be at such rate as Lender shall request. If Lender has waived the option to accelerate provided in this paragraph 17 and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release borrower from all obligations under this Mortgage and the Note.

Circuit has found that "if [an] obligor may assert oral side agreements reducing the value of assets formerly held by the bank, then the FDIC would be misled." *Chatham Ventures v. FDIC*, 651 F.2d 355, 361 (5th Cir. 1981).

The principles of *D'Oench, Duhme* were codified in 12 U.S.C. §1823(e) which provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement —
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. §1823(e) (1991). While neither Congress nor the Supreme Court has stated that these regulations apply to the FSLIC, the Fifth Circuit has held that "*D'Oench* and its progeny protect FDIC and FSLIC alike against arrangements likely to deceive a federal regulatory authority." *FSLIC v. Murray*, 853 F.2d 1251, 1254 (5th Cir. 1988); *FSLIC v. Lafayette Investment Properties, Inc.*, 855 F.2d 196 (5th Cir. 1988) (the common law *D'Oench, Duhme* doc-

trine applies to FSLIC as well as the FDIC).

The court finds that the alleged release from liability on the original notes would be an "agreement which tends to diminish or defeat the interest of the corporation;" therefore, for any agreement to be valid against FSLIC it must meet the standards of 12 U.S.C. §1823(e).

The Swords Group admit that they do not have a formal written release executed by the bank; however, they allege that Mr. Gatto, former president of New Orleans Federal, orally agreed to release them from the mortgages. Furthermore, the Sword Group alleges that the letter written by Mr. Rouse to the members of the Swords Group also releases them from liability under the mortgages. Finally, the Swords Group alleges they were released from the debt by Aberdeen's assumption of the debt.

The Swords Group alleges that Mr. Gatto orally agreed to release them from liability under the acts of sale and mortgage at a meeting between the parties in December 1972. The court finds that this release, if given, would diminish the interest of FSLIC; thus, 12 U.S.C. 1823(e) requires that such an agreement be in writing. The Swords Group has presented no evidence that indicates Mr. Gatto ever gave them a formal written release; therefore, the court finds that Mr. Gatto's alleged agreement to release the Swords Group is not valid against the claims of FSLIC.

The Swords Group next alleges that the letter from Mr. Rouse acts as a release from liability. The letter satisfies the first standard of 12 U.S.C. §1823(e) (i.e. it is in writing), but the court does not find that the letter was a written release "executed by the depository institution" as required by §1823(e)(2). Furthermore, the Swords Group

has not presented the minutes of the board meeting which show that the release this letter purportedly grants was "approved by the board of directors of the depository institution or its loan committee" as required by §1823(e)(3). Finally, an exhaustive search of the records of New Orleans Federal has failed to prove that the letter "has been, continuously, from the time of its execution, an official record of the depository institution" as required by §1823(e)(4). Therefore, the letter fails to meet the requirements of 12 U.S.C. §1823(e), and does not act as a valid release from the mortgages which the Swords Group signed on December 20, 1972.

Finally, the Swords Group contends that Article 17 of the original sale and mortgage documents, when read in light of the facts of this case, also releases them from the mortgages. Article 17 provides that Lender waives its option to accelerate by reaching an agreement in writing, with the person to whom the property is to be sold, that the credit of such person and the interest rate on the mortgage is satisfactory to Lender. If Lender has waived its option to accelerate, and Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release borrower from all obligations under the Mortgage and the Note.

The court recognizes that Article 17 may provide for a release in some situations, but finds that the conditions of release under Article 17 were not met in this case. The Swords Group has presented no written documentation that indicates New Orleans Federal reached an agreement in writing that the credit of Aberdeen was acceptable or that the interest payable on the sums secured by the mortgage were acceptable. The court recognizes that Ray W. Talley served as the notary public on the cash sales with assumption executed by the Swords Group and Aberdeen,

and that New Orleans Federal authorized Mr. Talley to prepare and pass the loan, but the court does not find that these actions prove New Orleans Federal's acceptance of Aberdeen's assumption of the Swords Group mortgages and notes. The parties have presented no other document that shows New Orleans Federal accepted the assumption agreement between Aberdeen and the Swords Group.

Even if the court were to find that Aberdeen's assumption was accepted in writing by New Orleans Federal, the Swords Group has not presented evidence that the release granted pursuant to Article 17 was approved by board of directors or loan committee of New Orleans Federal at one of their meetings. Thus, this agreement to release does not satisfy the third requirement of 12 U.S.C. §1823(e), and is not valid against FSLIC.

B. The Defendants are not entitled to a set-off due to the depreciated value of the properties.

In its answer to Plaintiffs original complaint, Aberdeen alleged that "FSLIC has allowed the subject property to deteriorate and has failed to use reasonable efforts to maintain and rent the subject property." Aberdeen further alleges that it "is entitled to a set-off in the full amount of the deterioration expense and lost rent caused by FSLIC." The court finds that Aberdeen's claim is not supported by the evidence, nor is it founded in law; therefore, the court holds that Aberdeen is not entitled to a set-off due to the depreciated value of the properties.

III. CONCLUSION

The court finds that under 12 U.S.C. §1823(e)

any oral agreement given by New Orleans Federal to release the Swords Group from their obligations under the acts of sale and mortgage are not valid against the FSLIC. Mr. Rouse's letter to the Swords Group also fails to meet the requirements of 12 U.S.C. §1823(e), thus, it does not release the Group from its obligations. Finally, though Article 17 provides for a release from the obligations under the mortgage, the conditions for obtaining this release were not met. Consequently, the court holds that the Swords Group was not released from their liability under the acts of sale and mortgage which they signed on December 20, 1972.

The court also holds that Aberdeen Preferred is not entitled to a credit or set-off against the amount owed on the mortgages due to alleged depreciation of the property caused by FSLIC.

Counsel for FSLIC will submit a proposed judgment to the court no later than February 8, 1991 at 12:00 noon.

* * * * *

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
FEB 4 '91

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, RECEIVER FOR NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION	*	**CIVIL ACTION NO. 88-5299 C/W 88-5300 C/W 88-5303**
VERSUS	*	**SECTION "D"**
LEONORA SWORDS, wife of/and JAMES L. ANDERSON, SR., ELSIE ROBERTSON, wife of/and GEORGE L. PERTUIT, III, PATRICIA VALE, wife of/and GEORGE M. BODRON, CHARLES F. BRAVE AND ABERDEEN-PREFERRED, A PARTNERSHIP IN COMMENDAM	*	**MAGISTRATE: 1**
**********	*	

J U D G M E N T

The pleadings and documents attached and filed into the record considered;

DATE OF ENTRY **FEB 27 1991**

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in Complaint No. 88-5299 in favor of **THE FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION** and against **LEONORA SWORDS wife of/and JAMES L. ANDERSON, SR., ELSIE ROBERTSON wife of/and GEORGE L. PERTUIT, III, PATRICIA VALE wife of/and GEORGE M. BODRON, and ABERDEEN PREFERRED, A PARTNERSHIP IN COMMENDAM,** jointly, severally and in solido in the principal amount of $79,032.02, interest which has accrued up through the day of August 18, 1988 in the amount of $6,799.80, an escrow shortage in the amount of $955.54, late charges in the amount of $511.91, plus a daily per diem rate subsequent to August 18, 1988 in the amount of $19.4836 per day until paid, based on 8 7/8% interest per annum on the principal amount due.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the mortgage recorded at MOB 603, folio 199 of the records of Jefferson Parish, Louisiana be recognized by this court, and there be Judgment herein ordering that the below described property be seized and after due advertisement and appraisal that it be sold at public auction and from the proceeds that complainant be paid in the amount of its claim or payment towards its claim in the event the proceeds are not sufficient to pay the claim in full, with preference and priority above all others.

> ONE CERTAIN LOT OR PORTION OF GROUND, together with all improvements and all the rights, ways, privileges, servitudes and advantages thereunto belonging or in anywise appertaining, situated in the Parish of Jefferson, State of Louisiana, in Scotsdale Subdivision, being a resubdivision of the Odom Tract, described

on a survey made by J. J. Krebs & Sons, Inc., Surveyors, dated January 6, 1965, approved by the Jefferson Parish Council, on June 23, 1966, in Ordinance No. 7770, a copy of which is attached to an Act of Dedication of Streets, passed before Neville M. Landry, Notary Public, on June 28, 1966, and registered in COB 639, folio 287, Parish of Jefferson, and also according to a resubdivision plan dated October 20, 1972, by Harris and Varisco, C.E., approved by the Jefferson Parish Planning Department and Council on November 16, 1972, under Ordinance 10956, and filed of record in COB 776, folio 926, said lot being designated and described as follows, to-wit:

LOT 8-A, Square F, which square is bounded by Aberdeen Drive, Argyll Drive, Loch Lomand Drive and Scotsdale Drive, and commences a distance of 610.58 feet from the corner of Aberdeen Drive and Argyll Drive, measures thence 80.29 feet front on Aberdeen Drive, a width in the rear of 80.66 feet, a depth on the side line adjoining Lot 9-A of 117.59 feet and a depth on the opposite side line of 125.37 feet, which said Lot 8-A is comprised of all of former Lot 8 and a portion of former Lot 9.

Property address: 1229 Aberdeen, Harvey, Louisiana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment herein in Complaint No. 88-5300 in favor of **THE FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION** and against **LEONORA SWORDS wife of/and JAMES L. ANDERSON, SR., ELSIE ROBERTSON wife of/and GEORGE L. PERTUIT, III, PATRICIA VALE wife of/and GEORGE M. BODRON and**

ABERDEEN PREFERRED, A PARTNERSHIP IN COMMENDAM jointly, severally and in solido in the principal amount of $79,032.02, interest which has accrued up through the day of August 18, 1988 in the amount of $6,799.80, an escrow shortage in the amount of $908.85, late charges in the amount of $538.72, plus a daily per diem rate subsequent to August 18, 1988 in the amount of $19.4836 per day until paid, based on 8 7/8% interest per annum on the principal amount due.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the mortgage recorded at MOB 603, folio 202 of the records of Jefferson Parish, Louisiana be recognized by this court, and there be Judgment herein ordering that the below described property be seized and after due advertisement and appraisal that it be sold at public auction and from the proceeds that complainant be paid in the amount of its claim or payment towards its claim in the event the proceeds are not sufficient to pay the claim in full, with preference and priority above all others.

> ONE CERTAIN LOT OR PORTION OF GROUND, together with all improvements and all the rights, ways, privileges, servitudes and advantages thereunto belonging or in anywise appertaining, situated in the Parish of Jefferson, State of Louisiana, in Scotsdale Subdivision, being a resubdivision of the Odom Tract, described on a survey made by J. J. Krebs & Sons, Inc., Surveyors, dated January 6, 1965, aproved by the Jefferson Parish Council, on June 23, 1966, in Ordinance No. 7770, a copy of which is attached to an Act of Dedication of Streets, passed before Neville M. Landry, Notary Public, on June 28, 1966, and registered in COB 639, folio 287, Parish of Jefferson, and also according to a resubdivision plan dated October 20, 1972, by Harris and

Varisco, C.E., approved by the Jefferson Parish Planning Department and Council on November 16, 1972, under Ordinance 10956, and filed of record in COB 776, folio 926, said lot being designated and described as follows, to-wit:

LOT 10-A, Square F, which square is bounded by Aberdeen Drive, Argyll Drive, Loch Lomand Drive and Scotsdale Drive, and commences a distance of 450 feet from the corner of Aberdeen Drive and Argyll Drive, measures thence 80.29 feet front on Aberdeen Drive, a width in the rear of 80.67 feet, a depth on the side line adjoining Lot 9-A of 109.81 feet and a depth on the opposite side line of 102.03 feet, which said Lot 10-A is comprised of a portion of former Lot 10 and all of former Lot 11.

Property address: 1237 Aberdeen, Harvey, Louisiana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment herein in Complaint No. 88-5303 in favor of **THE FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION** and against **LEONORA SWORDS wife of/and JAMES L. ANDERSON, SR., ELSIE ROBERTSON wife of/and GEORGE L. PERTUIT, III, PATRICIA VALE wife of/and GEORGE M. BODRON and ABERDEEN PREFERRED, A PARTNERSHIP IN COMMENDAM** jointly, severally and in solido in the principal amount of $79,198.28, interest which has accrued up through the day of August 18, 1988 in the amount of $7,399.85, an escrow shortage in the amount of $1,045.55, late charges in the amount of $627.32, plus a daily per diem rate subsequent to August 18, 1988 in the amount of $19.5246 per day until paid, based on 8 7/8% interest per

annum on the principal amount due.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the mortgage recorded at MOB 603, folio 200 of the records of Jefferson Parish, Louisiana be recognized by this court, and there be Judgment herein ordering that the below described property be seized and after due advertisement and appraisal that it be sold at public auction and from the proceeds that complainant be paid in the amount of its claim or payment towards its claim in the event the proceeds are not sufficient to pay the claim in full, with preference and priority above all others.

ONE CERTAIN LOT OR PORTION OF GROUND, together with all improvements and all the rights, ways, privileges, servitudes and advantages thereunto belonging or in anywise appertaining, situated in the Parish of Jefferson, State of Louisiana, in Scotsdale Subdivision, being a resubdivision of the Odom Tract, described on a survey made by J. J. Krebs & Sons, Inc., Surveyors, dated January 6, 1965, aproved by the Jefferson Parish Council, on June 23, 1966, in Ordinance No. 7770, a copy of which is attached to an Act of Dedication of Streets, passed before Neville M. Landry, Notary Public, on June 28, 1966, and registered in COB 639, folio 287, Parish of Jefferson, and also according to a resubdivision plan dated October 20, 1972, by Harris and Varisco, C.E., approved by the Jefferson Parish Planning Department and Council on November 16, 1972, under Ordinance No. 10956, and filed of record in COB 776, folio 926, said lot being designated and described as follows, to-wit:

LOT 9-A, Square F, which square is bounded by Aberdeen Drive, Argyll Drive, Loch Lomand Drive and Scotsdale Drive, and commences a

distance of 530.29 feet from the corner of Aberdeen Drive and Argyll Drive, measures thence 80.29 feet front on Aberdeen Drive, a width in the rear of 80.66 feet, a depth on the side line adjoining Lot 8-A of 117.59 feet and a depth on the side line adjoining Lot 10-A of 109.81 feet, which said Lot 9-A is comprised of a portion of former Lots 9 and 10.

Property address: 1233 Aberdeen, Harvey, Louisiana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT **LEONORA SWORDS wife of/and JAMES L. ANDERSON, SR., ELSIE ROBERTSON wife of/and GEORGE L. PERTUIT, III, PATRICIA VALE wife of/and GEORGE M. BODRON, and ABERDEEN PREFERRED, A PARTNERSHIP IN COMMENDAM** be and are cast in Judgment for **THE FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION'S** attorney fees in the amount of $11,462.00, plus all costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judicial interest on attorney fees is to accrue from date of Judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judicial interest on escrow deficiencies and late charges are to accrue from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claims by **LEONORA SWORDS wife of/and JAMES L. ANDERSON, SR., ELSIE ROBERTSON wife of/and GEORGE L. PERTUIT, III, and**

PATRICIA VALE wife of/and GEORGE M. BODRON against the firm of **KAVANAUGH and TALLEY and JOSEPH R. KAVANAUGH, RAY W. TALLEY and GARY J. ROUSE** be and the same are hereby dismissed on the merits, and that the third party defendants recover from third party claimants their costs of action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in Complaint No. 88-5299 there be judgment herein in favor of the third party plaintiffs, **LEONORA SWORDS, wife of/and JAMES L. ANDERSON, SR., ELSIE ROBERTSON, wife of/and GEORGE L. PERTUIT, III, PATRICIA VALE, wife of/and GEORGE M. BODRON** over and against **ABERDEEN PREFERRED, A PARTNERSHIP IN COMMENDAM** and **PREFERRED INVESTMENT CORPORATION**, its general partner, for all sums claimed to be due by the **FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION** in the sum of $79,032.02, interest, attorney's fees and costs, and/or for such sum as the third party plaintiffs were cast in the original judgment herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in Complaint No. 88-5300 there be Judgment herein in favor of the third party plaintiffs, **LEONORA SWORDS, wife of/and GEORGE L. PERTUIT, III, PATRICIA VALE, wife of/and GEORGE M. BODRON** over and against **ABERDEEN PREFERRED, A PARTNERSHIP IN COMMENDAM** and **PREFERRED INVESTMENT CORPORATION**, its general partner, for all sums claimed to be due by the **FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION**, in the sum of

$79,032.02, interest, attorney's fees and costs, and/or for such sum as the third party plaintiffs were cast in the original judgment herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in Complaint No. 88-5303 that there be Judgment herein in favor of the third party plaintiffs, **LEONORA SWORDS, wife of/and JAMES L. ANDERSON, SR., ELSIE ROBERTSON, wife of/and GEORGE L. PERTUIT, III, PATRICIA VALE, wife of/and GEORGE M. BODRON,** over and against **ABERDEEN PREFERRED, A PARTNERSHIP IN COMMENDAM** and **PREFERRED INVESTMENT CORPORATION,** its general partner, for all sums claimed to be due by the **FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, RECEIVER FOR NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION,** in the sum of $79,198.28, interest, attorney's fees and costs, and/or for such sum as the third party plaintiffs were cast in the original judgment herein.

JUDGMENT RENDERED in New Orleans, Louisiana this 26th day of Feb., 1991.

/s/ Illegible

U.S. DISTRICT JUDGE

APPENDIX "C"

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

NO. 91-3228
Summary Calendar

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, RECEIVER FOR NEW ORLEANS FEDERAL SAVINGS,
Plaintiff-Appellee,

VERSUS

LEONORA SWORDS, wife of/and JAMES L. ANDERSON, SR., ELSIE ROBERTSON, wife of/and GEORGE L. PERTUIT, III, PATRICIA VALE, wife of/and CHARLES F. BRAVE
Defendants-Third Party-Plaintiffs-Appellants,

VERSUS

ABERDEEN-PREFERRED, ET AL.,
Third Party Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
(88-5299D con/w 88-5300 & 88-5303D)

(December 12, 1991)

Before JOLLY, DAVIS and SMITH, Circuit Judges.

DAVIS, Circuit Judge:[1]

This appeal challenges the judgment of the district court in awarding the FDIC,[2] as receiver of New Orleans Federal Savings & Loan Association, recovery on three notes and permitting foreclosure on three mortgages securing the notes. We find no error and affirm.

I.

On December 20, 1972, Leonora Swords, wife of/and James L. Anderson, Sr., Elsie Robertson, wife of/and George L. Pertuit, III, and Patricia Vale, wife of/and George M. Bodron, (the Swords Group), purchased three pieces of property in Jefferson Parish, Louisiana. New Orleans Federal Savings and Loan Association (NOF) provided financing in the form of three promissory notes secured by mortgages on the property. By December 1974, the Swords Group was in default on the notes and mortgages. On December 18, 1974, the Swords Group met with David K. Gatto, then president of NOF, at which time the Swords Group signed away their rights to the mortgaged properties, Gatto orally released the Swords Group from their respective mortgages and NOF's attorneys, Kavanaugh and Talley, drew up a letter referring to the

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[2] As a result of Congressional changes in the administration of failed savings and loan associations the Federal Deposit Insurance Corporation, receiver for New Orleans Federal, (FDIC) was substituted as plaintiff in place of the Federal Savings and Loan Insurance Corporation (FSLIC), the original plaintiff. We will refer to the plaintiff as the FDIC throughout.

oral release and stating that they would prepare a Release of Liability to be executed by the parties. (The Release Letter) No formal release was ever executed.

On January 16, 1975, the Swords Group sold the properties to Aberdeen-Preferred (Aberdeen) for the outstanding balance of the respective mortgages in three transactions entitled "Cash Sale with Assumption of Mortgage." Aberdeen made the required payments on the notes until the fall of 1987. In June 1986, the FDIC declared NOF insolvent and took over the institution as receiver. The Release Letter prepared by NOF's attorneys was not in NOF's records; nor were any other documents found in NOF's records indicating that the Swords Group had been released from liability under the notes and mortgages.

In December 1988, the FDIC filed suit against both the Swords Group and Aberdeen on the notes in default. In January 1989, the Swords Group answered and filed a third party complaint against Aberdeen, the Kavanaugh and Talley firm, and individual members of that firm. In February 1990, the district court granted summary judgment in favor of Kavanaugh and Talley and its lawyers. The trial judge recused himself, after trial on the release issue but before rendering a decision, and the parties agreed that the replacement judge should rule on the basis of the compiled record plus additional evidence submitted by the Swords Group. In February 1991, the district court entered judgment in favor of the FDIC and ordered the properties sold to satisfy the unpaid debt. The district court also entered judgment in favor of the Swords Group against Aberdeen for the same amount. The Swords Group appeals.

II.

We note as an initial matter that our standard of review is not altered by the parties' agreement to have the replacement judge render judgment on the record compiled by the judge before whom the case was tried. The fact that the parties agreed to this procedure acts as a waiver of any objection. We will not overturn the district court's factual findings unless clearly erroneous. Fed. R. Civ. P. 52(a).

III.

The Swords Group defends against liability to the FDIC on two grounds. First, they assert that oral representations of the former president of NOF and representations in the Kavanaugh and Talley letter released them from liability. Second, they allege that they were released by the operation of Article 17 of the original mortgages. Both defenses fail.

The first defense fails because the requirements of the D'Oench Duhme doctrine are not met. The D'Oench Duhme doctrine allows the FDIC to rely on official bank records, to the exclusion of any extraneous matters, to set forth the rights and obligations of the financial institution. *D'Oench Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942), codified in 12 U.S.C. § 1823(e). The oral release alleged here and the release agreement referred to in the Kavanaugh and Talley letter are unenforceable against the FDIC because they are not reflected in the bank's records. *Campbell Leasing, Inc. v. Federal Deposit Ins. Corp.*, 901 F.2d 1244, 1248 (5th Cir. 1990). The Swords Group's good faith and the lack of a scheme to defraud the bank are irrelevant. "All that is relevant is that the agreements are not in the files." *Federal Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691, 698 (5th Cir. 1991).

The Swords Group's second defense relies on the Release Provision contained in Article 17 of the original mortgages. Article 17 provides that upon transfer of the property the Swords Group would be released from all obligations under the mortgage and note if (1) prior to the transfer NOF and the buyer agreed in writing that the buyer's credit is satisfactory and the mortgage rate acceptable, (2) the buyer has executed a written assumption agreement, and (3) the assumption agreement is accepted in writing by NOF. The parties do not dispute that requirements (1) and (3) were not met. The Swords Group relies instead on the course of conduct of the parties to satisfy the above requirements. Even if the actions of the parties were sufficient to meet the terms of the Article 17 Release Provision, this defense cannot be asserted against the FDIC under D'Oench Duhme. This follows because the release was not expressly manifest from the face of the document or other records in the institution's files. *Beighley v. Federal Deposit Ins. Corp.*, 868 F.2d 776, 783 (5th Cir. 1989).

In summary, the Swords Group's defenses to liability on the mortgage and notes fail because the explicit terms of the Article 17 Release Provision were not met and the D'Oench Duhme doctrine precludes them from relying on any oral agreement or document not contained in the financial institutions records.

IV.

The Swords Group filed third party claims against the Kavanaugh and Talley law firm and against individual attorneys within that firm asserting that if they had not been released from their obligations, it was due to the attorneys' negligence. This claim is based on the letter to them from the attorneys dated December 18, 1974 which provides:

> In keeping with the conversation and agreement had this date, by and between the above referred individuals [the Swords Group] and David K. Gatto, President of New Orleans Federal Savings & Loan Association, this law firm will prepare a Release of Liability on each of the above referred properties. Upon the proper execution of these releases, multiple originals will be mailed to the present mortgagors.

The attorneys represented NOF and had no authority to execute a release of the Swords Group. The district court granted summary judgment against the Swords Group on this issue. We affirm.

Louisiana follows that majority view that an attorney does not owe a legal duty to his client's adversary when acting on his own client's behalf. *Penalber v. Blount*, 550 So.2d 577, 581 (La. 1989). Thus, a non-client cannot hold his adversary's attorney personally liable for malpractice or negligent breach of a professional obligation. *Id.* The Swords Group counters that the letter quoted above created an attorney-client relationship or at least made them third-party beneficiaries of the attorneys' obligations to their own client, NOF. We addressed this situation in *Bergman v. New England Insurance Company*, 872 F.2d 672 (5th Cir. 1989). In that case we held that no attorney-client relationship or third-party beneficiary relationship was created when the attorney for the buyer promised the sellers that required corporate resolutions authorizing the transactions would be furnished to the parties. As in this case, the promised documents were never prepared or filed. We stated "[i]t is not unusual for the attorney representing one party to prepare the instruments which are to be signed by all parties. It would stun the practicing bar to learn that when an attorney did so, he or she became accountable as the attorney for all parties-signatory." *Id.* at 675.

We conclude therefore that the district court did not err in granting summary judgment against the Swords Group in favor of the law firm and its members.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, RECEIVER FOR NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION	*	CIVIL ACTION NO. 88-5299 c/w 88-5300 c/w 88-5303
VERSUS	*	SECTION "C"
LEONORA SWORDS, wife of/and JAMES L. ANDERSON, SR., ELSIE ROBERTSON, wife of/and GEORGE L. PERTUIT, III, PATRICIA VALE, wife of/and GEORGE M. BODRON, CHARLES F. BRAVE AND ABERDEEN-PREFERRED, A PARTNERSHIP IN COMMENDAM	*	MAGISTRATE: 3
**********	*	

REPORT OF SEARCH PURSUANT TO
COURT'S ORDER OF OCTOBER 2, 1989

MAY IT PLEASE THE COURT:

Pursuant to the court's order of October 2, 1989

which directed FSLIC to make an additional search for relevant documents, depose parties who were familiar with the transactions, the following is submitted:

1.

On October 16, 1989, counsel for **FSLIC** contacted Mr. Mark Smith, III, who was listed as one of the directors of **NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION** in December of 1974. In as much as counsel for **FSLIC** is well acquainted with Mark Smith, III, having met him approximately two (2) years prior to the filing of this matter, he was able to question Mr. Smith extensively concerning the operations of **NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION** in the years 1974 and 1975. Mr. Smith basically stated that he had no knowledge of the "Swords Group" loan, he did recall one of the names but had no information as to whether or not a release had been granted. Mr. Smith stated that as best he could recall, assumptions of loans were not documented in the Board of Directors meetings.

Mr. Smith was questioned as to the whereabouts of the other directors of **NEW ORLEANS FEDERAL** during 1974. He indicated that he had no knowledge of their whereabouts, and in fact, one of the directors is now deceased and as far as he knew, the President, Mr. David K. Gatto, was somewhere in Brazil as a result of alleged irregularities of the operation of **NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION.** Mr. Smith referred counsel for **FSLIC** to a Mr. Charles E. Young who was with the Loan Committee of **NEW ORLEANS FEDERAL** in 1974. Mr. Young was questioned, via telephone, and he indicated that he had no knowledge or recollection whatsover of the "Swords Group" loan. With the exception of Joseph Kavanaugh

and Ray W. Talley, who are the third party defendants in this matter, an attempt to contact all of the other listed directors was made by counsel for **FSLIC**, as well as persons being listed in the Loan Committee in the Board of Directors meetings for December, 1974. Counsel for **FSLIC** was unable to locate any of the parties listed other than Mr. Smith and Mr. Young as stated above.

2.

On October 12, 1989, counsel for **FSLIC** and counsel for the "Swords Group" traveled to Atlanta, Georgia where the office of **FSLIC** is presently located. An oral deposition of Ms. Dorothy Ann Gwen was conducted. Ms. Gwen, in her deposition, stated that she was the manager of all the receivership records which included that **NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION.** Ms. Gwen further stated that she had a listing of the inventory of all documents which were part of **NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION** from the date the receivership began. Ms. Gwen stated that on June 19, 1986 the Milling, Benson, Woodward, Hillyer, Pierson & Miller law firm made a physical inventory of the records of **NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION.** From the physical inventory, the list of inventory was prepared.

Ms. Gwen, at page 34 of her deposition, when questioned: "Did you search in that area, make a physical search for the minutes of 1975?"; Answer: "Yes we did, we called for all the cartons containing minutes and we looked through them in case it was mislabeled or just overlooked." Question: "Okay, and in the calls or the searches, the minutes for 1975 were not located?"; Answer: "No, they were not." When questioned "Do you have any explanation for what could have happened to the minutes of 1975?", she answered "Based on this inventory, the only thing I could

say is that they were not on the premises at time of takeover." (takeover of **NEW ORLEANS FEDERAL** by **FSLIC**). Ms. Gwen, throughout her deposition, explained that an extensive search was made for the documents, but they could not be found, and her records reflected that they did not exist or were not part of the inventory when the takeover by the **FSLIC** was enacted.

3.

On October 12, 1989, the deposition of Mr. J. Elliot May, the Asset Manager, was conducted in Atlanta, Georgia. His deposition reflects that extensive searches for the records were conducted; however, the minutes and Loan Committee meetings of January and February, 1975 could not be located.

Mr. May produced his complete file of the three (3) separate loans which included documents previously filed into the record, appraisals of the property, as well as microfiche documents which reflected the loan payment history of the various documents. These documents were reproduced, the microfiche documents were enlarged, and forwarded to counsel for the "Swords Group."

After October 12, 1989, J. Elliot May continued the search for the documents; however, they were not located.

Subsequent to October 12, 1989, counsel for **FSLIC** ocnferred with Herschel Haag, III, attorney for **FSLIC** with the firm of Milling, Benson, Woodward, Hillyer, Pierson & Miller, relative to the inventory of the documents. Their records reflect that there were no Minutes of the Board of Directors or Minutes of the Loan Committee for the months of January and February, 1975 as indicated in the Affidavit attached hereto.

The original depositions of Dorothy Gwen and J. Elliot May are attached herein.

CONCLUSION

Counsel for **FSLIC** submits that every effort possible has been made to locate the missing documents; however, they either did not exist at the time of the takeover of **NEW ORLEANS FEDERAL SAVINGS AND LOAN ASSOCIATION** by **FSLIC** or they were not part of the bank records and had been destroyed, if in fact they did exist prior to takeover by **FSLIC.**

Respectfully submitted

LILLEY and LIGHTFOOT, P. C.

BY: /s/ Roy S. Lilley

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I certify that a copy of this pleading has been sent to all counsel of record by placing same in U.S. mail, postage prepaid.

Date 11-27-89

/s/ Roy S. Lilley

APPENDIX "E"

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified in aforesaid Parish and State, personally came and appeared HERSCHEL L. HAAG III, who, after being first duly sworn, did depose and state that:

Affiant is a partner with the law firm of Milling, Benson, Woodward, Hillyer, Pierson & Miller, fee counsel for FSLIC, as Receiver for New Orleans Federal Savings and Loan Association ("NOF") (now "FDIC as Manager of the FSLIC Resolution Fund, as Receiver for New Orleans Federal Savings and Loan Association") and was personally involved with the closing of NOF on or about June 20, 1986.

Affiant further declared that a diligent search has been made of all records available and that he has communicated with office personnel now in the Milling Firm's employ, as well as former employees, who were connected with the closing of New Orleans Federal Savings & Loan Association, but that no information was obtained regarding the whereabouts of the Minutes of the Board of Directors and Minutes of the Loan Committee of NOF for the

months of January and February, 1975.

/s/ Herschel L. Haag III
HERSCHEL L. HAAG III

Sworn to and subscribed
before me this 21 day of
Nov., 1989.

/s/ Illegible
NOTARY PUBLIC

/55291

APPENDIX "F"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-3228

FILED
JAN 30 1991

FEDERAL DEPOSIT
INSURANCE CORPORATION, Receiver
for New Orleans Federal Savings
and Loan Association,
Plaintiff-Appellee,

versus

LEONORA SWORDS, ET AL.,
Defendants-Third Party-
Plaintiffs-Appellants,

versus

ABERDEEN-PREFERRED, ET AL.,
Third-Party-Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING
(January 30, 1992)

Before JOLLY, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *denied*.

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES FOR STAY OF THE MANDATE

ENTERED FOR THE COURT:

/s/ W. Eugene Davis

United States Circuit Judge

RFHG-4

(2)

No. 91-1463

Supreme Court, U.S.
FILED
MAY 12 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

LEONORA SWORDS, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' defenses based upon oral and unrecorded agreements are barred by *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and 12 U.S.C. 1823(e) (1988 & Supp. II 1990).

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In the Supreme Court of the United States

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FEDERAL DEPOSIT INSURANCE CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A19-A25) is unpublished, but the decision is noted at 951 F.2d 345 (Table). The opinion of the district court (Pet. App. A1-A9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1991. A petition for rehearing was denied on January 30, 1992. Pet. App. A33-A34. The petition for a writ of certiorari was filed on March 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 20, 1972, petitioners purchased three pieces of property in Jefferson Parish, Louisiana. New Orleans Federal Savings and Loan Association (NOF) arranged financing for the purchases in the form of three promissory notes secured by mortgages on the properties. Pet. App. A2.

By December of 1974, petitioners were in default on the notes and mortgages. On December 18, 1974, petitioners met with the president of NOF and relinquished their rights to the mortgaged properties. In return, NOF's president orally released petitioners from the mortgages. Although NOF's attorneys wrote a letter that referred to the oral release and stated that the attorneys would prepare a release of liability to be executed by the parties, no written release was ever executed by NOF. Pet. App. A20-A21.

On January 16, 1975, petitioners sold the properties to Aberdeen-Preferred (Aberdeen) for the amount of the outstanding mortgages. Aberdeen assumed the mortgages and began making the required payments on the notes. In the fall of 1987, however, Aberdeen stopped making payments on the notes. Pet. App. A21.

In June 1986, NOF was declared insolvent, and the Federal Savings and Loan Insurance Corporation (FSLIC) was appointed receiver.[1] On December 1, 1988, the FDIC filed suit against petitioners and Aberdeen on the notes. Petitioners answered and filed a third party complaint against Aberdeen and NOF's former attorneys. In February 1990, the district court granted a

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[1] The Federal Deposit Insurance Corporation (FDIC) later assumed FSLIC's role as receiver for NOF pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, §§ 401-406, 103 Stat. 354-363.

motion for summary judgment in favor of NOF's attorneys. Pet. App. A21.

On February 4, 1991, following a bench trial, the district court issued an opinion holding that petitioners were "not released from their liability." Pet. App. A3. The court held that the defendants were barred by the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and its statutory counterpart, 12 U.S.C. 1823(e) (1988 & Supp. II 1990), from relying on the alleged oral release from NOF's president. In addition, the court held that the letter from NOF's attorneys "does not act as a valid release" because it was not "executed by the depository institution." Pet. App. A6-A7.

2. The court of appeals affirmed. Pet. App. A19-A25. The court of appeals agreed with the district court that "the oral release alleged here and the release agreement referred to in the [attorneys'] letter are unenforceable against the FDIC because they are not reflected in the bank's records." Pet. App. A22. The court of appeals observed that the petitioners' "good faith and the lack of a scheme to defraud the bank are irrelevant. 'All that is relevant is that the agreements are not in the files.' " *Ibid.*, citing *FSLIC* v. *Griffin*, 935 F.2d 691, 698 (5th Cir. 1991).

ARGUMENT

Petitioners contend (Pet. 6-13) that the court of appeals erred in applying the *D'Oench* doctrine and its statutory counterpart, 12 U.S.C. 1823(e) (1988 & Supp. II 1990),[2] to this case. In particular, petitioners allege that

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[2] Section 1823(e) of Title 12 provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository

minutes of the meetings of NOF's Board of Directors and Loan Committee for January and February of 1975 are missing. See Pet. App. A29-A30. Petitioners argue that the missing minutes may have shown that the board of directors approved the oral agreement releasing petitioners from their obligations to NOF, and that petitioners should not be held responsible for the lost minutes. Petitioners' contentions merit no further review.

As an initial matter, neither the district court nor the court of appeals found that any of NOF's minutes are missing, lost or misplaced. It is not surprising that the courts below did not address that issue, because petitioners' allegations concerning the missing minutes are legally irrelevant. Petitioners would be liable to the FDIC even if they could demonstrate that NOF's minutes were missing, and even if they were entitled to assume that the missing minutes contained the board's approval of the oral agreement.[3] That is so because the

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institution, shall be valid against the Corporation unless such agreement —

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. 1823(e) (Supp. II 1990), as amended by FIRREA § 217, 103 Stat. 256.

[3] We do not agree that petitioners are entitled to the benefit of any such assumption. In similar circumstances, the courts have rejected borrowers' arguments that they need not produce a written

D'Oench doctrine, in both its common law and statutory forms, expressly requires that any agreement that diminishes the interest of the FDIC in an asset acquired by it must be (1) in writing, (2) executed by the financial institution, (3) approved by the institution's board of directors or loan committee, and (4) continuously in the financial institution's official records. A notation in NOF's minute books that the board of directors or loan committee had approved an agreement releasing petitioners from their obligations would not satisfy the requirements of *D'Oench* or Section 1823(e) absent a corresponding written and executed release in NOF's official records. See 12 U.S.C. 1823(e) (1988 & Supp. II 1990); *Beighley* v. *FDIC*, 868 F.2d 776, 782 (5th Cir. 1989) (common law *D'Oench* doctrine and its statutory counterpart bar similar defenses); *Kilpatrick* v. *Riddle*, 907 F.2d 1523, 1526 n.4 (5th Cir. 1990) (same), cert. denied, 111 S. Ct. 954 (1991). Petitioners have never contended that such a release exists; indeed, they have conceded that it does not. See Pet. App. A6. Consequently, petitioners' argument based on the allegedly missing minutes cannot absolve them of liability to the FDIC.

Petitioners are incorrect in suggesting (Pet. 10, 11) that the *D'Oench* doctrine does not apply unless the borrower is guilty of fraud or wrongdoing. The essence of the *D'Oench* doctrine is that the FDIC is entitled to rely, to the exclusion of any extraneous matters, on the official bank records that set forth the rights and obligations of the bank and those to whom the bank lends money. The purposes underlying this rule are to allow federal and state examiners to rely on a bank's official

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agreement if the records of the financial institution are incomplete. See *RTC* v. *Ruggiero*, 756 F. Supp. 1092, 1097 (N.D. Ill. 1991); *RTC* v. *Madison Street*, No. 89-4212 (E.D. La. Aug. 31, 1990).

records in evaluating the worth of the bank's assets, to encourage prudent consideration in lending practices, and to assure proper recordation of banking acts to guard against collusive or erroneous reconstruction of terms. See *Langley* v. *FDIC*, 484 U.S. 86, 91-93 (1987). Accordingly, agreements that do not meet the requirements of *D'Oench* and 12 U.S.C. 1823(e) (1988 & Supp. II 1990) are unenforceable even if the borrower is innocent of any fraud or other wrongdoing. "Simply put, transactions not reflected on the bank's books do not appear on the judicial radar screen either." *Bowen* v. *FDIC*, 915 F.2d 1013, 1016 (5th Cir. 1990).[4]

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[4] Petitioners cite (Pet. 11) *FDIC* v. *Meo*, 505 F.2d 790 (9th Cir. 1974), for the proposition that they have clean hands and therefore should be permitted to rely on the alleged oral agreement as a defense against the FDIC's claim. As other courts have recognized, however, *Meo* is obsolete in light of this Court's decision in *Langley*. See *FSLIC* v. *Gordy*, 928 F.2d 1558, 1567 n.14 (11th Cir. 1991) (*Meo* "is based on an outdated understanding of the *D'Oench* doctrine"); see also *Baumann* v. *Savers Fed. Sav. & Loan Ass'n*, 934 F.2d 1506, 1516 (11th Cir. 1991), petition for cert. pending, No. 91-1118. Following *Langley*, the courts of appeals have held that good faith is irrelevant to the application of *D'Oench*. See, *e.g.*, *Beighley* v. *FDIC*, 868 F.2d 776, 784 (5th Cir. 1989); *Taylor Trust* v. *Security Trust Fed. Sav. & Loan Ass'n*, 844 F.2d 337, 342 (6th Cir. 1988). In any event, the facts of *Meo* differed from the facts of this case. In this case, unlike in *Meo*, petitioners neglected to ensure that the alleged oral agreement was reduced to writing. And in this case, unlike in *Meo*, petitioners sought to defend against the FDIC's claim by relying on an alleged oral agreement with the lender.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DOROTHY L. NICHOLS
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MAY 1992